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IN THE SUPREME COURT OF FLORIDA

**FILED**

SID J. WHITE

OCT 29 1987

CLERK, SUPREME COURT

By \_\_\_\_\_

Case No. 7 Dept. Clerk

JAMES WILLIE SIMS,  
Petitioner,  
v.  
STATE OF FLORIDA,  
Respondent.

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DISCRETIONARY REVIEW OF THE DECISION OF  
THE SECOND DISTRICT COURT OF APPEAL  
STATE OF FLORIDA

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**BRIEF OF RESPONDENT ON THE MERITS**

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PRELIMINARY STATEMENT

JAMES WILLIE SIMS will be referred to as the "Petitioner" in this brief and the STATE OF FLORIDA will be referred to as the "Respondent". The Record on Appeal, which consists of one (1) volume, will be designated by the letter "R" followed by the appropriate page number.

SUMMARY OF THE ARGUMENT

The habitual offender statute can be reconciled with the sentencing guidelines where the enhanced sentence does not exceed the guidelines presumptive range. The guidelines themselves countenance the operation of both statutory provisions in 3.701(d)(10), Fla. R. Crim. P. and the purposes of section 775.084 are not met by the mechanical apparatus of the guidelines.

The Guidelines Commission, Justice Grimes, several District Courts of Appeal and the legislature have all indicated agreement with the position espoused in this brief. The state requests the Court to answer the certified question in the affirmative and to dispel any notion that Whitehead can be read to prohibit the application of the habitual offender statute where the enhanced sentence is within the guidelines range.

ARGUMENT

ISSUE  
(restated)

WHETHER THE HABITUAL OFFENDER STATUTE IS  
APPLICABLE WHERE THE ENHANCED SENTENCE IS  
WITHIN THE PRESUMPTIVE GUIDELINES RANGE.

In Whitehead v. State, 498 So.2d 863 (Fla. 1986), this Court found that the Habitual Offender Statute (§775.084, Fla. Stat.) could be neither used as an alternative to the sentencing guidelines nor relied on as a reason for departure from the guidelines. While the Court found it impossible to reconcile the two statutes where the enhanced sentence exceeded the guidelines sentence, such finding is not mandated where the enhanced sentence falls within the presumptive guidelines range.

Petitioner relies on the Court's inability to reconcile the statutes in the Whitehead scenario to assert that the habitual offender statute may not be employed in this case. However, such a restrictive reading of Whitehead and the statutes is not required or mandated. Section 775.084, Fla. Stat. and the guidelines can and should be read to preserve both statutes. See State v. Digman, 294 So.2d 325 (Fla. 1974).

The guidelines clearly envision utilizing section 775.084, Fla. Stat. to enhance sentences.

If the offender is sentenced under section 775.084 (habitual offender), the maximum allowable sentence is increased as provided by the operation of that statute. If the sentence imposed departs from the recommended sentence, the provisions of paragraph (d)(11) shall apply.

Committee Note to Rule 3.701(d)(10), Fla. R. Crim. P.; The Florida Bar: Amendment to Rules of Criminal Procedure (3.701, 3.988 - Sentencing Guidelines), 468 So.2d 220 (Fla. 1985). The guidelines specifically countenance the statutes operating together.

Nothing else in the guidelines renders the statutes irreconcilable in the instance where the enhanced sentence does not exceed the guidelines. This Court has noted that the habitual offender statute provides an enhanced penalty based on the defendant's prior record and a finding the defendant poses a danger to society, which are both counted in the presumptive sentence. Whitehead, at 865. While the guidelines do count number and seriousness of prior crimes, they do not account for the fact that little time has passed since the commission of those crimes and the current one. While the guidelines score some circumstances that may indicate dangerousness, they cannot score subjective factors attendant to the prior crimes. These factors, (e.g., endangering the general public or victimizing only elderly or helpless people) when considered with the circumstances of the current crime, warrant enhancement the guidelines are incapable of accommodating. Indeed, this Court recognized the existence of these unscored factors in authorizing departure on them. Whitehead, at 865.

The purposes of the habitual offender statute are not met by the mechanical apparatus of the guidelines. As argued above, the guidelines do not address two important considerations of section



775.084: timing and circumstances boding danger to society.

This Court, through Justice Grimes, has already indicated agreement with the position asserted in this brief. In acting on the recommendations of the Sentencing Guidelines Commission, Justice Grimes agreed with the suggestion that the Habitual Offender Act could be utilized in those instances in which the permitted guidelines range exceeds the total statutory maximums for the offenses charged. Florida Rules of Criminal Procedure Re: Sentencing Guidelines (Rules 3.701 and 3.988), \_\_\_ So.2d \_\_\_ (Fla. 1987) [12 F.L.W. 162].

Attached as appendix A is the text of the recommendation supporting the continued vitality of the habitual offender act where the guidelines are not exceeded. The state urges this Court to dispel the idea that Whitehead, supra requires a holding contrary to the Second District Court of Appeal's in this case. See, Sims v. State, 487 So.2d 37 (Fla. 2d DCA 1986) and Sims v. State, \_\_\_ So.2d \_\_\_ (Fla. 2d DCA, Sept. 9, 1987) [12 F.L.W. 2226].

We do take issue, however, to the apparent dictum in Whitehead to the effect that there no longer is reason for the Habitual Offender Act to exist. We believe that the Habitual Offender Act is still viable (and should be utilized) in those instances in which the presumptive guidelines range in a particular case exceeds the total statutory maximums for the offenses charged. In such an instance, an extended term can be sought under the Act to impose a sentence within the presumptive guidelines range. Such an interpretation would be consistent with both the guidelines system and the Habitual Offender Act, since an individual whose guidelines range exceeds the statutory maximum would, in most instances, almost certainly

fall within anyone's interpretation of an individual for whom an extended term is necessary for protection of the public. (Appendix A).

Several other courts have adopted the position that the habitual offender statute remains a viable method to enhance the statutory maximum penalty of an offense so as to be useful in connection with Rule 3.701. Hoefert v. State, 509 So.2d 1090 (Fla. 2d DCA 1987); see also, King v. State, \_\_\_ So.2d \_\_\_ (Fla. 4th DCA, Sept. 9, 1987) [12 F.L.W. 2165]; Smith v. Wainwright, 508 So.2d 768 (Fla. 2d DCA 1987); Winters v. State, 500 So.2d 303 (Fla. 1st DCA 1987) and Myers v. State, 499 So.2d 895 (Fla. 1st DCA 1986). The only court to agree with the petitioner that Whitehead renders section 775.084 inoperable even where the enhanced sentence is within the guidelines range is the Fifth District Court of Appeal. See, Frierson v. State, \_\_\_ So.2d (Fla. 5th DCA, July 2, 1987) [12 F.L.W. 1616]. However, they have acknowledged conflict in Kersey v. State, \_\_\_ So.2d \_\_\_ (Fla. 5th DCA, Sept. 24, 1987) [12 F.L.W. 2305].

The legislature has, by its silence, indicated agreement with the argument made here. The legislature is presumed to pass statutes with the knowledge of prior existing statutes. See, Littman v. Commercial Bank & Trust Co., 425 So.2d 636 (Fla. 3d DCA 1983) and cases cited therein. Therefore, they did not intend to render the habitual offender statutes inoperable by adopting the sentencing guidelines. This past session they had the opportunity to rectify any errors since Whitehead, supra had been decided. They chose not to amend the guidelines applicable

to enhancements and presumptive sentences. See, Chapter 87-110, Laws of Florida.

It is possible to give effect to both the habitual offender act and the sentencing guidelines where the enhanced sentence does not exceed the presumptive sentence. Neither Whitehead, supra nor the statutes themselves warrant such interpretation and the state urges this Court to answer the certified question in the affirmative.

CONCLUSION

Based upon the foregoing reasons, argument and citations of authority, this Honorable Court should affirm the decision of the Second District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to John T. Kilcrease, Jr., Assistant Public Defender, Polk County Courthouse, P. O. Box 9000 - Drawer PD, Bartow, Florida 33830, this 27<sup>th</sup> day of October, 1987.

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